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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 357

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY AND AUTOMOBILE OWNERS SAFETY INSURANCE COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals and the dissenting opinion of Circuit Judge Johnsen (Pet. App.[1] 20a-30a, 41a-46a) are reported in 255 F. 2d 289 and 255 F. 2d 295. The opinions of the Federal Trade Commission (Pet. App. 8a-15a, 33a-39a) are not yet reported.

[1] The abbreviation "Pet. App." is used to refer to the Appendix to the petition for writ of certiorari.

JURISDICTION

The judgments of the court of appeals (Pet. App. 31a-32a, 47a-48a) were entered on June 13, 1958. The petition for a writ of certiorari was filed on September 11, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Each petitioner is incorporated in Missouri, is licensed to do business in no other state, and mails to prospective customers within and without Missouri literature soliciting purchase of its accident and health insurance policies. Each petitioner, on the appeal to the Commission from the hearing examiner's initial decision, expressly waived any contest of the ruling that the Commission had statutory authority to deal with petitioner's practices. Likewise, petitioners did not question the Commission's statutory authority in the review proceedings instituted in the court below, and the opinions which the court rendered do not discuss this question.

The first question presented, as stated by petitioners, is whether the Federal Trade Commission has jurisdiction, under the Federal Trade Commission Act, "of the advertising practices of an insurance company licensed only in the state of its domicile and conducting business with persons in other states by mail, when the domiciliary state is regulating the advertising practices of such companies under its own laws." However, we think that the two following preliminary questions are those which, in this

connection, are crucial to grant or denial of certiorari:

(a) Whether this Court should review a question of statutory authority which petitioners had not presented either to the Commission or to the court below, and which the court below had adjudicated only *sub silentio.*

(b) Whether misrepresentation of the terms of petitioners' policies is "regulated" by Missouri law within the meaning of the exemption from the Federal Trade Commission Act given by the McCarran-Ferguson Act.[2]

The second question presented by petitioners may be restated as follows:

Whether the Commission's determination that certain of petitioners' representations were misleading and deceptive should be set aside because the Commission treated as irrelevant petitioners' contention that their representations conformed to trade practice rules for advertising and sales promotion of "mail order insurance" which the Commission, on application by members of the industry, had approved.

STATUTES INVOLVED

The relevant provisions of the Federal Trade Commission Act, the McCarran-Ferguson Act, and laws

[2] Decision of this question would apply only to companies incorporated in Missouri, and without agents or offices elsewhere, engaged in selling insurance contracts solely by means of mail or radio advertising.

of Missouri are set forth in the petition for certiorari (pp. 3-5).

STATEMENT

The facts and proceedings as to the two petitioners, American Life and Accident Insurance Company (American) and Automobile Owners Safety Insurance Company (Automobile Owners), are substantially the same. For convenience, the facts and proceedings will be stated with reference to American, with notation where there is any material difference respecting Automobile Owners.

In October, 1954, the Commission issued a complaint charging that American disseminated in interstate commerce misleading and deceptive statements concerning the terms of its insurance policies, known in the insurance trade as "accident and health" or "hospital and surgical" policies, and thereby violated the Federal Trade Commission Act (R. 2-11).[3] After the taking of evidence before a hearing examiner, he issued an initial decision in which he found that American is incorporated and licensed to do business in Missouri; is licensed to do business, and has offices or agents, in no other state; mails form letters accompanied by advertising material and application forms to prospects whose names it has obtained;[4] ad-

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[3] We use the designation "R." to refer to the printed record in the court below in American's review proceeding and the designation "O.R." to refer to the printed record in the court below in the review proceeding brought by Automobile Owners.

[4] There are nine follow-up mailings if the addressee fails to respond, the first three at 10-day intervals and the last six at 30-day intervals.

vertised by radio to stimulate inquiries concerning its policies; and in its mail and radio advertising made certain misleading and deceptive statements concerning the terms and provisions of its policies (R. 19-20, 27-38).[5]

Respecting the Commission's authority to deal with American's practices, the examiner ruled that, while a Missouri statute makes it unlawful for an insurance company such as American to misrepresent the terms of its insurance policies, the prohibition can be enforced against the company only by means of revoking its charter, and that mere power of charter revocation is not regulation by state law within the meaning of the proviso of the McCarran-Ferguson Act making the Federal Trade Commission Act applicable to the business of insurance to the extent that such business is not "regulated by State law" (R. 20-26).[6]

The examiner found that in June, 1954 (four months before the complaint issued), American had discontinued most of the representations against which the complaint was directed; that it had affirmatively declared that they would not be resumed; and that it had shown willingness to comply with

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[5] Automobile Owners did not advertise by radio and solicited purchasers solely by mail (O.R. 28). Its advertising material was prepared by an advertising agency and approved by Automobile Owners, and the printing and mailing was by a Chicago mailing house (*ibid.*).

[6] In Automobile Owners the examiner did not spell out the grounds for his conclusion that the proceeding was within the Commission's jurisdiction (O.R. 13).

trade practices rules which had received Commission approval (R. 40-41).[7] The examiner concluded from the foregoing that there was no need for entry of a cease and desist order (R. 41).

American did not appeal from the findings and rulings adverse to it (R. 43, 48-49). On appeal by counsel supporting the complaint, the Commission substituted its own "conclusions" and "order" for those of the examiner, set aside his findings relating to American's abandonment of its illegal practices, substituted findings of deception as to certain representations which the examiner had found not deceptive, and otherwise adopted the examiner's initial decision (R. 43-47).[8] In an opinion which it filed, the Commission stated its reasons for rejecting the examiner's conclusions and some of his findings (R. 47-54).

American's petition for review of the Commission's order assigned as error only the following: (1) the Commission's rejection of compliance with the trade practice rules as a defense, (2) its failure to conclude that American's "abandonment" of its illegal practices warranted dismissal of the proceeding, and (3) the making of findings of misleading and deceptive representations, absent adequate evidentiary sup-

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[7] The Commission repealed the rules in August 1956 (21 F.R. 6332).

[8] In the Automobile Owners proceeding, the Commission did not adopt any of the examiner's initial decision, but entered its own findings of fact, conclusions, and order (O.R. 25-34). However, the Commission's departures from the initial decision were substantially the same as in the American proceeding (O.R. 34-39).

port (R. 151-156). The opinion of the court below sustaining the validity of the Commission's order considers only the grounds upon which American sought reversal of the order (Pet. App. 20a-29a).

ARGUMENT

1. Petitioners, in asking this Court to review the Commission's statutory authority to issue cease and desist orders against petitioners, rely upon the proposition that an appellate court may consider a question of jurisdiction even though the question had not been raised or had been waived, in the prior proceedings (see Pet. 19). It is doubtful that even questions of jurisdiction may be raised under these circumstances (*Halsted* v. *Securities and Exchange Commission*, 182 F.2d 660 (C.A. D.C.)), but, aside from that, it would not follow that it is appropriate in these circumstances for this Court to exercise its discretionary power of review by certiorari. Grant of review would necessarily partially undercut the salutary general rule that a court empowered to review administrative action will confine itself to the issues raised and contested in the administrative proceeding.[9] *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 155; *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291; *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37.

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[9] While each of the present petitioners raised the jurisdictional question in its answer to the Commission's complaint (R. 17; O.R. 11), each subsequently waived Commission determination of the question (Pet. App. 21a, 42a).

There are, we submit, further persuasive reasons for not granting the requested writ of certiorari to review the question of the Commission's statutory authority. (1) Since this question was not presented to the court below or discussed in its opinion and was passed upon *sub silentio*, the decision is not a binding precedent even in the court below. *Tucker Truck Lines, supra*, at 38. (2) The threshold question respecting the Commission's statutory authority is whether petitioners' misrepresentations are "regulated" by Missouri law, as that word is used in the proviso of Section 2(b) of the McCarran-Ferguson Act.[10] This is not a question of federal law of general importance, but involves interpretation of a particular state statute in relationship to the McCarran-Ferguson Act proviso. (3) The Commission plainly acted within its statutory authority in entering orders against petitioners and the decision below, in tacitly sustaining this exercise of authority, clearly is correct. Petitioners sent through the mails allegedly deceptive communications to persons residing in states other than Missouri, and petitioners, not being licensed to do business in these other states and having no office or agent therein, were not within

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[10] In *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560, the examiner ruled that the Commission had authority to prohibit the insurance company's misrepresentations only in the states in which its misrepresentations were not regulated by state law, namely, Mississippi, Missouri, Montana, Rhode Island, and the District of Columbia (the District of Columbia being defined as a state in the McCarran-Ferguson Act). Record in No. 435, October Term, 1957, page 202.

the reach of any ban on deceptive statements by insurance companies imposed by their laws. Since the McCarran-Ferguson Act exempts from the Federal Trade Commission Act only conduct which is within the sphere of a like state regulatory law, and since the Commission's orders are directed against conduct not within this sphere,[11] the Commission had full authority to act.

2. We submit that there is no merit in petitioners' contention that the Commission erred in failing to consider whether petitioners' representations transgressed trade practice rules approved by the Commission and currently outstanding. Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition and unfair or deceptive acts or practices and prescribes the procedure for determining whether this prohibition has been violated. No provision of the statute authorizes the Commis-

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[11] Each petitioner in answering the Commission's complaint, admitted that "it is not subject to the jurisdiction of any State other than the State of Missouri" (R. 14; O.R. 9).

Virginia's "Blue Sky Law" has been held applicable to a company incorporated in another state, not licensed to do business in Virginia and with no office or paid agent in Virginia, which entered into insurance contracts, solicited by mail, with Virginia residents. *Travellers Health Association v. Virginia*, 339 U.S. 643. But, unlike the Virginia "Blue Sky Law", state laws imposing on insurance companies prohibitions akin to those of the Federal Trade Commission Act are not designed to reach out-of-state companies engaged solely in the mail-order insurance business. Apparently Automobile Owners recognized the different scope of Virginia's "Blue Sky Law" and the pertinent state insurance laws—it sold its policies "in every state except the State of Virginia" (O.R. 27).

sion to define by rule and regulation conduct which does or does not violate Section 5. Nor has the Commission purported to ascribe to trade practice rules any binding or substantive effect. The Commission's Trade Practice Conference Rules state that these rules "are in the nature of advisory opinions for the guidance of businessmen" (16 C.F.R., 1958 Supp. Sec. 2.21), and that, "The entire procedure is aimed at voluntary observance (*id.*, Sec. 2.29). They also provide (*id.*, Sec. 2.30):

> Formal complaint proceedings involving practices which are violative of trade practice rules charge violation of the statutory provision on which the rules are premised, and do not charge violation of the trade practice rule.

In a proceeding under Section 5, it is no defense that the conduct proceeded against complied with a trade practice rule approved by the Commission, since such rule "is merely advisory and in no way deprives the Commission of statutory jurisdiction it otherwise would have." *Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F. 2d 7, 13 (C.A. 2).

Cases such as *Accardi* v. *Shaughnessy*, 347 U. S. 260, *Service* v. *Dulles*, 354 U. S. 363, cited by petitioners (Pet. 25), hold that when an executive officer has duly issued rules and regulations prescribing the procedure to be followed in administering and implementing certain statutory authority, the rules, while they remain in force, are of binding effect, and that administrative or executive action

which is in violation of the rules is invalid. Since the Commission's trade practice rules are explicitly stated to be purely advisory in character and aimed solely at voluntary observance of the statute, we submit that the foregoing decisions are inapposite.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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